No. 17,924

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Plaintiff-Appellant,

vs.

TIDEWATER OIL COMPANY,
Defendant-Appellee.

MOTION FOR PERMISSION TO FILE A STATEMENT AMICI CURIAE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING, AND STATEMENT AMICI CURIAE

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Amici Curiae

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To The Honorable Frederick G. Hamley, J. Warren Madden and James R. Browning, Judges of the United States Court of Appeals for the Ninth Circuit:

As friends and attorneys of the Court, the undersigned respectfully request permission to file the following statement in support of the petition of Appellee for rehearing in this matter.

This motion is filed because the opinion of the Court, upon the basic meaning and administration of section 2 of the Sherman Act (15 U.S.C. 2), is not in accord with other decisions of this Court, or other courts of appeals and of

the Supreme Court of the United States. We confine our statement to this single point in the Court's opinion which is of primary importance to the bar and the public.

Dated: February 3, 1964.

Respectfully submitted,

John A. Sutro,

Francis R. Kirkham,

Pillsbury, Madison & Sutro,

Amici Curiae.

STATEMENT

That portion of the court's opinion to which we respectfully urge its particular attention is as follows:

> "The essence of monopoly power is power to control prices and exclude competition and what we have said demonstrates that there was * * * specific intent to acquire and exercise *such* power with respect to a part of commerce." (pamphlet opinion p. 20)
>
> * * *
>
> "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' " (pamphlet opinion page 21)

On September 6, 1963 this court in *Walker Distributing Co. v. Lucky Lager Brewing Co.* (9 Cir. Sept. 6, 1963) CCH Trade Cases par. 70,886 page 78,565 held to the contrary:

> "We do not think either count states a sufficient claim under section 2 of the Sherman Act, which makes it illegal to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . .' . . ."
>
> "Nowhere is there any allegation, direct or indirect, that the purpose or effect of the charged conspiracy is to monopolize, or that Lucky has monopolized or attempted to monopolize the beer market. For all that appears, there may be any number of other beers being sold in the market involved, however it may be defined, and by any number of distributors. Nothing whatever is said about Lucky's position in the market in question. It is not enough that Lucky be one of the largest manufacturers of beer in the west. That tells us nothing of its market position or power in

> the territory where the conspiracy is claimed to operate."

On July 16, 1963, this court held that monopoly power "depends upon the degree of control the defendant could exert in a particular market" (*Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. July 16, 1963) 5 CCH Trade Reg.Rep., par. 70,848, p. 78,440) and further held:

> "* * * [P]laintiff was required to produce proof that a defendant's acts were not 'predominantly motivated by legitimate business aims' [*Times-Picayune Publishing Co. v. United States* [1953 Trade Cases [par.] 67,494], 345 U.S. 594, 626-27 (1953)], but instead were done in order *to gain monopoly power*" (emphasis added).

An attempt to monopolize necessarily requires, as an object, a market and the exercise of market power. In *American Tobacco Co. v. U.S.* (1946) 328 U.S. 781, 785, the Supreme Court approved an instruction to the jury that an attempt to monopolize "means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which though falling short, nevertheless approach so close as to create a dangerous probability of it" (p. 785).

On December 23, 1963, the Court of Appeals for the Second Circuit held with respect to attempted monopolization that a market constituting an "appreciable part" of interstate commerce must necessarily be involved (*Rock of Ages Corp. v. H. E. Fletcher Co.* (2 Cir. Dec. 23, 1963) 5 CCH Trade Reg.Rep., par. 70,979, p. 78,893):

> "Although that section [section 2 of the Sherman Act] condemns actual or attempted monopolization of 'any part of the trade or commerce among the several States, or with foreign nations,' it is settled that this means a market constituting 'some appreciable part.' "

In *American Football League v. National Football League* (4 Cir. Sept. 23, 1963) 323 Fed.2d 124, 132, footnote 18, the court held:

> "It is elementary that in order to find the offense of conspiracy or attempt to monopolize, there must be a specific, subjective intent to gain an *illegal degree of market control.* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 127; United States v. Griffith, 334 U.S. 100, 105, 68 S.Ct. 941, 92 L.Ed. 1236; American Tobacco Co. v. United States, 328 U.S. 781, 814, 66 S.Ct. 1125, 90 L.Ed. 1575; Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518" (emphasis added).

Similarly, in *Ace Beer Distributors, Inc. v. Kohn Inc.* (6 Cir. June 11, 1963) 318 F.2d 283, certiorari denied November 18, 1963, rehearing denied January 6, 1964, 32 U.S. Law Week, pp. 3185, 3244, the court held in an attempt to monopolize case that the complaint did not state a cause of action when it was restricted to one brewer's product.

This Court's holding in the case at bar that when the charge is attempt to monopolize the relevant market is not in issue, appears to place in jeopardy of prison sentence every businessman who competes with the purpose

of displacing his competitor for the particular business for which he and his competitor are competing. If the relevant market is not an issue and a specific "intent to monopolize," i.e., to capture all of some subject matter of competition, is all that is required, then every competitive attempt to sell to any single customer constitutes an attempt to monopolize.

We respectfully submit that this Court cannot intend such a drastic change in the law and that appellee's petition for a rehearing should be granted.

Dated: February 3, 1964.

Respectfully submitted,

JOHN A. SUTRO,
FRANCIS R. KIRKHAM,
PILLSBURY, MADISON & SUTRO,
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